93-888

CASE NO. (1)

Supreme Court, U.S.
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THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

BRUCE W. JACKSON, and
JEANNETTE L. JACKSON, **PETITIONER**

vs.

JIM MITCHELL, and
JED DAVIS, P.A. **RESPONDENT**

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT THE STATE OF MAINE

PETITION FOR A WRIT OF CERTIORARI

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46 pp

QUESTION PRESENTED FOR JUDICIAL REVIEW

The Supreme Judicial Court of Maine, Sitting as the Law Court, erred in affirming a summary judgment for foreclosure in favor of Appellees, based on failure to produce an expert witness in order to prove legal malpractice, when the questions in the cause were well within the ordinary experience and knowledge of laymen and could have been decided without such testimony, thereby denying the Appellants their right to due process guaranteed under Article V of the United States Constitution.

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IN THE SUPREME COURT OF THE UNITED STATES

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT THE STATE OF MAINE

The petitioner Bruce W. Jackson respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Judicial Court of the State of Maine, Sitting as the Law Court, entered in the above styled cause on July 9, 1993.

REFERENCE OF OPINIONS

March 27, 1992, Superior Court State of Maine. Entry of Summary Judgment in favor of Plaintiffs, Jed Davis, and Jim Mitchell, P.A.

July 9, 1993, Supreme Judicial Court State of Maine, Sitting as the Law Court, Judgment of Lower Court Affirmed.

STATEMENT OF JURISDICTION

In affirming the Summary Judgment granted to the Appellees, the lower courts have failed to view the facts in the light most favorable to the Appellants, (against whom the judgment was entered). This has caused a violation of Appellants' rights to not be deprived of life, liberty, or property without due process of law, as guaranteed under Article V of the Constitution of the United States of America. As there is an issue of genuine material fact in this case.

CONSTITUTIONAL AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia,

when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF MATERIAL FACTS

The Appellants provide the following Statement of Material Facts as to which it contends there is genuine issue to be tried:

1. On December 15, 1987, the Appellants entered into a contract with the Appellees to which the Appellants were to secure Appellees' fees and expenses in a law suit against banks to be filed by them, the Appellees.

2. The only exception agreed upon under the terms of that contract was the firm's fees and expenses were to be secured by a mortgage on Appellants' property in Edinburg, Maine.

3. Pursuant to the contract, the Appellants executed to the Appellees a mortgage deed dated May 31, 1988 thereby fulfilling the performance of, and as

required under the contract by the Appellants, to the provisions of such contract.

4. The Appellants were not in any way bound by the contract to procure any experts, legal, banking, or any other experts, necessary for the Appellees to perform under the contract.

5. The Appellees after wasting valuable time on one negative bank expert, then turned the task over to the Appellants to find the experts who were then, and now are residing in Florida. 1991 Affidavit, of Bruce W. Jackson, dated November 18th paragraphs 9 through 15.

6. The Appellants never agreed to, or signed any new contracts with the Appellees on March 1st, 1989 thereby, there was no meeting of the minds to constitute a new

contract. Therefore, Appellees were operating under the new contract, when they made up the Pro Se complaint, for the Appellants to file, thereby, they were operating under a moot contract, and at the same time breaching the December 15, 1987 contract, and thereby, nullified the then operating mortgage given from the Appellants to the Appellees under the December 15th, 1987 contract.

7. The Appellants were demanding the money owed to them on March 1st, 1989 under the December 15th, 1987 contract, which is why they needed a promissory noted to coincide with the moot contract or new contract.

8. The Appellees appointed an associate to them to work on the Appellants' bank case, however, he, Michael Popkin was

adverse to the Appellants' causes, from the onset of his representation to the Appellants, by his own admission in a statement to the Board of Overseers of the Main State Bar, on October 10, 1989 as prepared by himself personally, those feelings, were never revealed to the Appellants, therefore, making the Appellants believe, that the Appellees would indeed perform under the contract, keeping this knowledge to themselves, and indeed also claiming the Appellants, Jacksons, were unbalanced, is indeed self-serving to the Appellees monetarily, and creates a question to the instant validity of any contracts with the Appellees, and raises the question of fraud and deceptive practices on the part of the Appellees, against the Jacksons, also the claim that the Jacksons needed a

psychiatrist instead of an attorney, by the Appellees would invalidate any contracts or agreements between the parties, whereas any contract with unbalanced parties would be null and void, and no action, or claims, by the Appellees, could be constitutionally upheld, or enforced. Thereby creating no material fact for the Appellees whatsoever and would add to the malice and intent to commit fraud and deceit upon the Jackson's as clients, and would render the Appellees' with no genuine issue of fact to be tried.

9. The Appellees were to bring any law suits for the Appellants under the contract dated December 15th, 1987. The Appellees signed the contract with full knowledge of all issues that would arise out of any investigation, nothing was held back by the Appellants. The Appellees failed to admit

to the Appellants that they had a conflict and would not be able to satisfy their obligation under the contract to the Appellants, thereby creating false security to the Jacksons that they finally found a law firm that could represent them without repercussions.

10. The Appellants, nor anyone else, who had been through what the Appellants had been through, would knowing that just a hint of conflict by that firm, would ever sign a contract with that firm. By them retaining that information, they were again being fraudulent and deceitful to the Appellants, and breaching the contract, and trust of the Jacksons. The Appellees knowingly, maliciously, and intentionally, deceived the Appellants, and breached the contract by failing to perform their duty under the contract.

11. The Appellants never saw the new contract until the Board of Overseers received it on October 10th, 1989 and forwarded same to the Appellants. The new contract being the March 1st, 1989 contract, had no provisions for the mortgage on Appellants real property to remain in effect to secure payment of all past and future legal fees and expenses. On March 1st, 1989, the Appellees asked for the money owed them, and they would draw up a promissory not, to coincide with the new contract. The Appellants declined, and continued to the Appellees to perform to the provisions of the December 15th, 1987 contract with certified mail and through telephone calls up to the time in September when the Appellants reported the Appellees to the overseers of the bar.

12. The Appellants have incurred great loss and expenses due to the foreclosure issue, and the Appellees failure to perform under the only agreed upon contract.

Respectfully Submitted dated at Port Orange, Florida, this 6th day of October, 1993.

Rule 10.1.(b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

ARGUMENT

The Superior and the Supreme Courts of Maine erred in requiring expert testimony in order to prove legal malpractice on the part of the Appellees'. The standard of review the law court shall apply in a appeal from a grant of Summary Judgment is whether, viewing the evidence in the light most favorable to the party against whom judgment was granted, the trial court committed any errors of law. Town of Freeport V. Greenlaw 602 A2d 1156 (Me 1992). the point of law that must be considered here is whether or

not expert testimony is required to prove the claim of legal malpractice. Although the law court has not addressed this issue, it is generally accepted in most jurisdictions which have dealt with the issue, that expert testimony is required to establish a prima facia case of legal malpractice. Unless the attorney's negligence is so obvious that a layperson would have no problem would have no problem recognizing it. Asphalt Engineers, Inc. v. Galusha, 770 P2d 1180 (AZ App 1989), Barth V. Regan, 546 N.E.2d 87(IL 2d DCA 1989), Hooper v. Gill, 557 A2d 1349 (MD 1989). The reasoning is that an expert can establish the standard of care an attorney should follow, and any deviation from that which may have occurred. There are however, three (3) exceptions to this rule.

1. Where the area of alleged negligence is within the common knowledge of a layperson.

2. Where the claimed error was "Failure to follow Clients instructions".

3. Where the attorney concedes that the charge of misconduct constitutes malpractice, but denies the conduct took place.

In reviewing the foresaid we must first address the issue of what will constitute " common knowledge". The most prevalent example of the common knowledge exception to the requirement of Expert Testimony is; the attorneys allowing the statutes of limitation to run House v. Maddos 360 N.E. 2d 580 (IL 3rd DCA 1977), Collins v. Greenstein 595 P2d 275 (HA 1979) in Collins a directed verdict in favor of an attorney

in a legal malpractice suit was reversed, it was alleged that through the attorney's negligence his client's suit against her creditors for alleged fraud was not timely filed with the results that it was barred by the statute of limitations. Noting that the trial judge had based his directed verdict in the legal malpractice suit on grounds that there was insufficient evidence that the attorney's conduct was the proximate cause of the client's injury based on the fact that, the client had failed to establish by expert testimony that the standard of professional care applicable to the attorney. The court said; that it is not an absolute rule that expert testimony be presented to establish the standard of care in all cases involving legal malpractice may be sufficiently clear

without the aid of experts, in which case it is for the trial court to determine the reasonable standard of care, skill, and diligence which must be exercised by an attorney. The court concluded that the case should have been allowed to go to the jury. 14 ALR 4th 170. As discussed in Carlson v. Morton, 745 P2d 1133 (MT 1987) there are several other instances in which actions have been submitted for fact determination without the use of expert testimony, in which will qualify for the (3) exceptions noted in Barth v. Supra. These include the failure of a criminal defendant's attorney to appear in court on his client's behalf. Bowman v. Doherty, (1984), 235 KN 870, 686 P2d 112, 120; the lawyers failure to file suit within the appropriate statute of limitations; George v. Caton (Ct. App.

1979), 93 NM 370, 600 P2d 822, 829; Collins v. Greenstein, (1979), 61 HA 26, 595 P2d 275, 283; failure of the attorney to retain a first mortgage for seller on property being conveyed despite seller's clear demand for a first mortgage; Olfe v. Gordan, (1980), 93 WS 2d 173, 286 N.W. 2d 573, 576; attorney's interjection of client's claims as a permissive counterclaim in state court despite client's clear demand to file it as a separate claim in Federal Court is a question of material fact that may or may not require expert testimony. Nemec v. Deering (SD 1984), 350 N.W. 2d 53, 56; the attorneys failure to insulate one client from the debts of another client Hill v. Okay Const., (1977), 312 MN 324, 252 N.W. 2d 107, 116; and the attorney's failure to notify a client that he is resigning from

the case thus resulting in a default judgment, Central Cab Co., v. Clark (1970), 259 MD 542, 270 A2d 662, 667. (Carlson Supra, 1137, 1138). The case cited herein points to the fact that there are situations in which expert testimony is not required in order to prove negligence in a malpractice suit. Appellant feels that the facts in the instant case viewed in the light most favorable to the Appellant will fit the exceptions to the rule set forth in Barth v. Regan Supra, first, Appellees allowed the statute of limitations to run so close to it's end before informing Appellants that they would not represent them that Appellants could find no other council to represent them in the matter, within the time remaining. Appellee offered to give advise to the Appellants on a Pro Se basis

and the clients refused. Thereby leaving their clients (who had no expert knowledge of the legalities of their suit) to fend for themselves. These facts show an obvious neglect of duty to the Appellants by the Appellees and present questions which should be heard by the trier of fact.

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APPENDIX

Decision & Order of Superior Court..... A2

Decision of Supreme Court of Maine A13

STATE OF MAINE SUPERIOR COURT

PENOBSCOT, ss. CIVIL ACTION

DOCKET NO. CV-90-449

JIM MITCHELL and JED DAVIS, P.A.

PLAINTIFFS

v.

BRUCE W. JACKSON and JEANNETTE L. JACKSON

DEFENDANTS

Plaintiffs, Jim Mitchell and Jed Davis, attorneys with the law firm of Mitchell & Davis, P.A. in Augusta, Maine, move this Court for summary judgment pursuant to M.R. Civ. P. 56 on their claim to foreclose a real estate mortgage and recover the sum of $7,950.67 in legal fees, plus interest and costs. Additionally, plaintiffs move this Court for summary judgment on defendants' counterclaim alleging breach of contract, negligence, malpractice, and emotional

distress. Plaintiffs, represented by counsel, and defendants acting pro se have submitted memoranda supporting their positions. A hearing was held on March 5, 1992. After consideration of the entire record, this Court finds as follows.

Facts

The parties first met in the fall of 1987 to discuss plaintiffs' legal representation of defendants regarding a land title dispute and a lawsuit against banks for conspiracy to cut off plaintiffs' credit. on December 15, 1987, the parties signed a contract for legal services on these matters. Total legal fees were estimated in the contract at $45,000.00. Under the terms of the contract, payment of legal fees was secured by a mortgage on land in Edinburg, Maine owned by defendants. The mortgage was executed and delivered to plaintiffs.

Upon further investigation of the land

title dispute, the parties agreed to drop the matter. As the bank investigation progressed, plaintiffs concluded that a lawsuit was inappropriate without a credible banking expert who would testify on defendants' behalf and that without such an expert witness, the suit would fail. Plaintiffs contacted an expert who was then State Director of the Independent Bankers Association of America. After twice reviewing the circumstances, his opinion of plaintiffs' case was unfavorable. Unable to locate an expert with a favorable opinion of defendants' banking situation, plaintiffs declined to prosecute unless defendants could locate an expert witness, stating that to do so could be a waste of defendants' money and emotional resources. The statute of limitations for filing the claim, known to all parties, was March 1, 1989.

In January, 1989, defendants stated they

had found two Maine bankers willing to testify but were unwilling to reveal their identities, a situation unacceptable to plaintiffs. In February, 1989, Attorney Davis arranged for defendants to meet with his original potential expert witness hoping that with additional information, the expert would change his mind about testifying. However, following the meeting, the banking expert again declined to testify on defendants' behalf. On February 23, 1989, Attorney Davis told Mr. Jackson that under the circumstances, he was unwilling to sign a complaint, that to do so would violate Rule 11 of the Code of Professional Responsibility. Defendants were unwilling to proceed with the suit pro se.

Defendants would not agree to terminate firm representation by the firm following a suggestion that they do so. The parties met in August and September, 1989 at defendants'

request to discuss other possible lawsuits. On August 31, 1989, defendants wrote to the Board of Overseers of the Bar complaining against plaintiffs.

On June 20, 1990, plaintiffs filed this suit to foreclose the real estate mortgage and collect legal fees. On or about August 7,1990, defendants answered and counterclaimed alleging breach of contract, negligence, and malpractice. On July 18, 1991 by amended complaint, defendants alleged emotional distress, and sought punitive damages in the amount of $100,000,000.00.

On October 25, 1991, plaintiffs filed a motion for summary judgment on defendants' counterclaim and for summary judgment on their mortgage foreclosure claim

DISCUSSION

Summary judgment is appropriate when the pleadings, together with depositions, answers to interrogatories, admissions and

affidavits, if any, show that there is no genuine issue of material fact and that any party is entitled to judgment as a matter of law. M.R.Civ.P. 56(c). The moving party has the burden to prove the absence of any genuine issue of material fact. See Celotes Corp. v. Catrett, 477 U.S. 319 (1986); Finn v. Lipman, 526 A.2d 1380,1382 (Me. 1987); Tucci v. Guy Gannett Pub. Co., 464 A.2d 161,166 (Me. 1983).

The function of the judge in a summary judgment proceeding is not to weight the evidence to determine the truth. If sufficient evidence exists, taking all factual inferences in favor of the non-moving party, to enable a jury to render a verdict in favor of that party, summary judgment is not appropriate. Anderson v. Liberty Lobby, Inc. 477 U.S. 242,249-52 (1986); see also Finn, 526 A.2d at 1382; Tucci, 464 A.2d at 166. In this case, with regard to

defendants' counterclaim, this Court is satisfied that defendants have failed to introduce necessary expert testimony to support their allegation against plaintiffs and thus have failed to establish that a genuine issue of material fact exists. Therefore, summary judgment is appropriate on defendants' counterclaim.

M.R.Civ.P. 56(e) states that "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon mere allegations or denials of that party's pleading, but must respond by facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him," "[E]xpert evidence is required in a legal malpractice case to establish the attorney's breach of his duty of care except in cases where the breach or lack thereof is so obvious that it may be

determined by the Court as a matter of law or as within the ordinary knowledge and experience of laymen." Annotation, Admissibility and Necessity of Expert Evidence as to Standards of Practice and Negligence in Malpractice Action Against Attorney, 14 ALR 4th 170, 173 (1982).

Here, breach of plaintiffs' legal duty as alleged by defendants is not obvious or within the knowledge and experience of a layman, therefore expert testimony is necessary to support defendants' malpractice counterclaim. Defendants' allegations of malpractice involve the plaintiffs' judgment regarding the viability of defendants' claim against Maine banks for conspiracy and denial of credit, and plaintiffs' refusal to proceed with that claim absent testimony by a credible banking expert supporting defendants' position. Knowledge of banking practices, accepted legal practices,

substantive law and rules for attorney discipline are necessary to determine if plaintiffs breached their duty of care in determining that established law would not support the filing of defendants' claim. By affidavit, Attorney Davis asserts that in his professional opinion, he acted in a diligent, careful and prudent manner at all times in his representation of defendants. Absent expert testimony supporting their allegations and refuting plaintiff's assertions, defendants raise no genuine issue of material fact and their counterclaim fails as a matter of law.

With regard to plaintiffs' motion for summary judgment on the mortgage foreclosure action, this Court finds that the a genuine issue of material fact exists concerning the existence of a new contract and promissory note which defendants allege plaintiffs presented to them on March 1, 1989, and was

subsequently used by Attorney Davis as an exhibit to the Board of Overseers of the Bar. As a question of fact exists regarding the existence of a new contract which the defendant claims not to have signed (see p.7 of Bruce Jackson's affidavit), summary judgment cannot be granted at this time. This question of fact, however may be resolved by motion for summary judgment and additional affidavits. Therefore, the Court allows the plaintiffs to proceed further by affidavit and motion for summary judgment, addressing this question of fact on the mortgage foreclosure claim.

WHEREFORE, the entry is:

Plaintiffs' motion for summary judgment on defendants counterclaim is **granted**. Regarding plaintiffs' motion for summary judgment on defendants' mortgage foreclosure claim, the Court allows plaintiffs to proceed further by affidavit and motion for summary

judgment, addressing the question of fact regarding the existence of a contract and promissory note between the parties on or about March 1, 1989.

Maine Supreme Judicial Court

Reporter of Decisions

Decision no. 6570

Law Docket No. PEN-92-496

JIM MITCHELL AND JED DAVIS, P.A.

v.

BRUCE W. JACKSON and JEANNETTE L. JACKSON

Submitted on briefs May 13, 1993

Decided July 9, 1993

Before **WATHEN, C.J. and ROBERTS, GLASSMAN, CLIFFORD, COLLINS, AND DANA, JJ.**

Bruce W. and Jeannette L. Jackson appeal from a summary foreclosure judgment entered in the Superior Court (Penobscot County, Kravchuk, J.) in favor of Jim Mitchell and Jed Davis, P.A. (the attorneys) and from a summary judgment (Pierson, J.) entered in favor of the attorneys on the Jacksons' counterclaim. We affirm the judgments.

In late 1987, the Jacksons met with the attorneys to discuss their contention that

several Maine banks were conspiring to cut off their credit. In December 1987, the parties entered into a written contract pursuant to which the attorneys agreed to provide legal services in the he "investigation of and lawsuit against banks for conspiracy to cut off clients' credit." The Jacksons' payment of legal fees under the contract was secured by a mortgage on a large tract of undeveloped land owned by the Jacksons' in Edinburgh. The attorneys informed the Jacksons of the need to secure a banking expert in order to pursue the matter. Jed Davis subsequently sought the assistance of Gary Knight, former State Director of the Independent Bankers Association of America; but after twice reviewing the substance of the Jacksons' banking claim, Knight refused to testify as an expert on their behalf.

In November 1988, Davis informed the Jacksons that he had been unable to find a

banker willing to testify in their case and that, without a credible expert, they would almost certainly lose. He suggested that if the Jacksons wished to pursue the matter further, they should look for a banking expert themselves and that the statute of limitations on their claim would expire on March 1, 1989. In January 1989, Bruce Jackson informed the attorneys that he had two potential witnesses but he "would not reveal their identities at that time." In February, Davis informed the Jacksons that he "would be unwilling to sign the complaint in the absence of [a banking] expert and in the face of Mr. Knight's unfavorable opinion" and that to do so "would have involved a violation of Rule 11." He informed them at that time that if they wished to pursue the matter, they would have to proceed *pro se*. Davis prepared a complaint for the Jacksons to file *pro se* as well as a new contract

under which the attorneys would provide "[a]divce regarding and assistance with the clients' pro se lawsuit against [banks]." The Jacksons refused to sigh the *pro se* complaint or the new contract. The statute of limitations subsequently expired on the Jacksons' bank claim.

The attorneys filed a complaint for foreclosure of the mortgage on the Jacksons' Edinburgh property alleging that the Jacksons failed to pay attorney fees owing under the December 1987 contract. The Jacksons answered and filed several counterclaims all of which essentially alleged legal malpractice.

The Superior Court (Pierson,J.) entered a summary judgment in favor to the attorneys on the Jacksons' counterclaims because the Jacksons failed to produce "necessary expert testimony to support their allegations against [the attorneys]." Later, the

Superior Court (Kravchuk J.) also entered a summary foreclosure judgment in favor of the attorneys. In response, the Jacksons appealed.

I.

Foreclosure Action

"In reviewing an entry of a summary judgment, we examine the evidence before the court in the light most favorable to the party against whom the judgment has been granted to determine if the trial court committed an error of law." Robinson v. Maine Central R.R., 623 A.2d 626,627 (Me. 1993) (quoting H.E.P. Dev. Group, Inc. v. Nelson, 606 A.2d 774,775 (Me. 1992)). The Jacksons contend that the trial court erred in granting a summary foreclosure judgment because the attorneys demonstrated their "intention to void the original contract secured by [the] mortgage" when they presented the Jacksons with a new contract

for providing assistance to the Jacksons in bringing a *pro se* action.

This contention is meritless. We have stated that "[a]n agreement to rescind a contract is itself a contract and must be evaluated by principles of contract law." Drinkwater v. Patten Realty Corp., 563 A.2d 772,775 (Me. 1989). Furthermore, we have required that in order "[t]o establish a legally binding agreement the parties must have mutually assented to be bound by all of its material terms [and this] assent must be reflected and manifested in the contract, either expressly or impliedly. Roy v. Davis , 553 A.2d 663,664 (Me. 1989). The new contract presented by the attorneys was never signed and the Jacksons conceded in their brief that , "there was no meeting of the minds to constitute a new contract." Under these circumstances, the attorneys' offer of the new contract had absolutely no impact on

the December 1987 contract secured by the mortgage.

II.

Malpractice Counterclaim

In their legal malpractice counterclaim, the Jacksons challenged the attorneys' judgment regarding the viability of their claim against several Maine banks for conspiring to deny them credit; the attorney's diligence in procuring a banking expert to support their position; and the attorneys' refusal to proceed on their claim without a banking expert. The Jacksons included only the affidavit of Bruce Jackson in support of their counterclaim for legal malpractice. The trial court (Pierson,J.) granted the attorneys' motion for a summary judgment on the Jacksons' counterclaims holding that "[a]bsent expert testimony supporting [the Jacksons] assertions, [they] raise no genuine issue of material fact and

their counterclaim fails as a matter of law." The Jacksons challenge this conclusion.

Although we have not addressed the necessity of expert testimony to establish an attorney's standard of care and breach thereof in legal malpractice case; we have decided, in claims for medical malpractice, that "[i]t is incumbent upon the plaintiff to show by expert testimony that the treatment pursued by the defendant was something other than that which the average and reasonable skillful physician would have employed." Downer v. Veilleux , 322 A.2d 82, 87 (Me. 1974) (emphasis added). Without supporting expert testimony in medical malpractice cases, "the plaintiff fails to make a case for the jury." Richard H. Field & Peter L. Murray, Maine Evidence s. 702.1 at 7-13 (3d ed. 1992). We created an exception to this general rule, however, for circumstances "where the negligence and harmful results are

sufficiently obvious as to lie within common knowledge;" in those situations, " a verdict may be supported without expert testimony." Cyr v. Giesen , 108 A.2d 316,318 (Me. 1954).

The majority of courts around the country have adopted the same general rule and exception for legal malpractice cases: expert evidence is required in legal malpractice case to establish the attorney's breach of duty "except in cases where the breach or lack thereof is so obvious that it may be determined by the Court as a matter of law, or is within the ordinary knowledge and experience of laymen." Michael A. DiSabation, Annotation: Admissibility and Necessity of Expert Evidence as to Standards of Practice and Negligence in Malpractice Action Against Attorney, 14 A.L.R. 4th 170, 173 (1982): see, e.g. Bloom v. Diekmann, 464 N.E.2d 187,188 (Ohio App. 1983) (affirming summary judgment where

client failed to produce any expert testimony on the issue of attorney's alleged negligence). We find this to be a sound principle.

The question remaining in this case then is whether the case at bar is one "where the breach or lack thereof is so obvious that it may be determined by the Court as a matter of law, or is within the ordinary knowledge and experience of laymen." Since the Jacksons are challenging the attorneys' judgment and diligence, the trial court did not commit reversible error by requiring expert testimony to establish the attorneys' standard of care and breach thereof, the Jacksons failed to establish a genuine issue of material fact and summary judgment was properly granted.

The entry is :

Judgments affirmed

(2)

Supreme Court, U.S.
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THE SUPREME COURT OF THE UNITED STATES

TERM COMMENCING OCTOBER 4, 1993

BRUCE W. JACKSON and
JEANNETTE L. JACKSON,

Petitioners,

v.

JIM MITCHELL AND
JED DAVIS, P.A.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Case No. 93-888

THE SUPREME COURT OF THE UNITED STATES

TERM COMMENCING OCTOBER 4, 1993

BRUCE W. JACKSON and
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STATEMENT OF THE CASE

This case involved no federal issues in the Maine courts. The Plaintiff sued the Jacksons for foreclosure of a mortgage which the Jacksons gave to the Plaintiff as security for payment of legal fees and costs. The Jacksons counterclaimed alleging legal malpractice.

There was no trial. All issues were disposed of on summary judgment. The trial court concluded that the Jacksons' failure to submit an affidavit from a legal expert in support of their claim that the Plaintiff had committed legal malpractice resulted in the absence of any disputed material fact. Therefore, the court granted summary judgment to the Plaintiff on the Jacksons' legal malpractice claim.

The Plaintiffs moved for summary judgment on their foreclosure complaint. The Jacksons opposed it on the basis that the contract for legal

services between the Plaintiff and the Defendants which called for the real property mortgage had been superceded by a subsequent contract for legal services. However, at the same time, they admitted that they had refused to sign the second contract and that there had never been a meeting of the minds with regard to it. Thus, the trial court concluded that the original contract for legal services, secured by the real estate mortgage, was in effect. There being no dispute about the fact that the Jacksons had failed to pay legal fees and costs, the court granted summary judgment.

The Maine Supreme Judicial Court sitting as the Law Court affirmed the trial court judgment. There is no discussion in the Law Court's decision of any federal or constitutional issue of law. That is because no such issue was raised. The Law Court affirmed the summary judgment on the

foreclosure action because it found that the Jacksons' only defense--that the original contract for legal services had been superceded--was "meritless."

With regard to the Jacksons' malpractice counterclaim, the Law Court adopted the "general rule" regarding the necessity of expert evidence in legal malpractice cases. It held that

> expert evidence is required in a legal malpractice case to establish the attorney's breach of duty "except in cases where the breach or lack thereof is so obvious that it may be determined by the Court as a matter of law, or is within the ordinary knowledge and experience of laymen."

Jim Mitchell and Jed Davis, P.A. v. Jackson, 627 A.2d 1014, 1017 (Me. 1993).

The Court concluded that the trial court did not commit reversible error by requiring expert testimony. With no expert testimony, the Law Court said, the Jacksons had failed to establish a genuine issue of material fact.

SUMMARY OF ARGUMENT

The Petitioners have failed to establish the Court's jurisdiction. Rule 10.1(b) requires that the state court of last resort "decided a federal question." That did not happen in this case.

The Petitioners' vague procedural due process argument is meritless. The summary judgment procedure by which this case was decided is one of the procedural foundations of our system of jurisprudence. It provides, and Petitioners availed themselves of, adequate procedural safeguards to meet the requirements of the Due Process Clause.

Because the Petition is frivolous, the Court is asked to award to the Respondent just damages and double costs, pursuant to Rule 42.2.

ARGUMENT

The Petitioners fail to establish this Court's jurisdiction to consider an appeal from the decision of the Maine Law Court. The Petitioners cite Supreme Court Rule 10.1(b) as the basis for the Court's jurisdiction. However, that Rule requires that the state court of last resort "decided a federal question."

Supreme Court Rule 14(h) requires that a petitioner for a writ of certiorari include in the statement of the case a description, with specific citations and quotations, of "the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised."

Although the Petitioners provide a 7-page statement of the case (entitled "Statement of Material Facts"), they entirely fail to meet the requirement of Rule 14(h). This failure results

from the fact that the requirement of Rule 14(h) cannot be met.[1]

The Maine Law Court did not decide a federal question. That Court decided the only issues before it, all of which were state law issues.

The Petitioners make some vague procedural due process argument. Although they do not appear to be making a claim under 42 U.S.C. Section 1983, the reasoning of Section 1983 case law applies. In Zinermon v. Burch, 494 US 113, 125-27, 108 L Ed 2d 100, 110 S Ct 975 (1990), the Court explained the procedural requirements of the Due Process Clause as follows:

> In procedural due process claims, the deprivation by state action of a constitutionally protected interest in "life, liberty or property" is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due process of law....The constitutional violation

---

1. Rule 14(k) requires the petitioner to prepare and file an appendix. No such appendix was served on Respondent's counsel.

actionable under Section 1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process. Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate....Due process...is a flexible concept that varies with the particular situation. To determine what procedural protections the Constitution requires in a particular case, we weigh several factors:

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." Mathews v Eldridge, 424 US 319, 335, 47 L Ed 2d 18, 96 S Ct 893 (1976).

The State of Maine provides procedures, of which the Petitioners availed themseves, which

clearly meet the requirements of due process. The summary judgment procedure is embedded deeply in federal and state law. It allows a litigant to present his case, through affidavit and otherwise; and the Petitioners availed teimseves of that procedural safeguard.

The requirement, which exists in a majority of jurisdictions, that a legal malpractice complainant present expert testimony, unless the lawyer's negligence is so obvious that it may be determined by the court as a matter of law, does not create a due process violation.

The fact that the Petitioners could not, in the context of a motion for summary judgment, present sufficient evidence to persuade the court that there was a genuine issue of material fact does not amount to a deprivation of due process.

There is no legal or factual basis for this Petition for a Writ of Certiorari. Rule 42.2

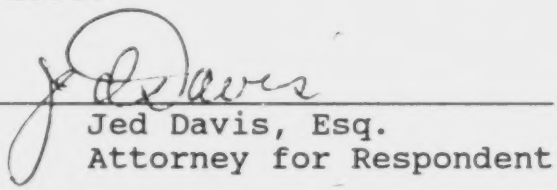
allows the Court, "[w]hen a petition for a writ of certiorari...is frivolous [to] award the respondent or appellee just damages and single or double costs."

CONCLUSION

No federal or constitutional issue was raised or decided by any Maine court. Thus, the requirement of Rule 10.1(b)--that the "state court of last resort has decided a federal question"--has not been met.

No basis has been shown for the exercise of this Court's jurisdiction. Therefore, the Petitioner's Petition for Writ of Certiorari should be denied; and, because the Petition is frivolous, the Court should award to the Respondent just damages and double costs.

Dated: December 21, 1993.



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91431/r

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of December, 1993, I mailed three (3) copies of Respondent's Brief in Opposition to Petition for Writ of Certiorari by first class mail, postage prepaid, to Bruce W. Jackson and Jeannette L. Jackson, P. O. Box 290844, Port Orange, Florida 32129.

Dated: December 22, 1993.

Jed Davis, Esq.
Attorney for Respondent

91434/r

Supreme Court, U.S.
FILED
JAN 13 1994
OFFICE OF THE CLERK

CASE NO. 93-888

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

BRUCE W. JACKSON AND
JEANNETTE JACKSON,
Petitioners

v.

JIM MITCHELL AND JED DAVIS, P.A.
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE MAINE SUPREME JUDICIAL COURT

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1. Jim Mitchell and Jed Davis, P.A. v. Bruce W. Jackson and Jeannette L. Jackson, 627 A.2d 1014 (Me. 1993).

2. Jim Mitchell and Jed Davis, P.A. v. Bruce W. Jackson and Jeannette L. Jackson, No. CV-90-449 (Me. Super. Ct., Penob. Cty., March 17, 1991).

JURISDICTION

Respondent asserts that the Supreme Court has no jurisdiction over this matter. The Petitioners failed to raise the Fifth Amendment issue below. Furthermore, the Fifth Amendment is not implicated by this issue Petitioners raise in their argument.

STATEMENT OF THE CASE

Petitioners asserted a legal malpractice crossclaim against Respondent in a foreclosure action commenced in Maine Superior Court. Summary judgment was entered against Petitioners on the grounds that they failed to raise a genuine issue of material fact with regard to the standard of care applicable to Respondent and Respondent's breach thereof (A. 9-10). This judgment was upheld on the same grounds by the Maine Supreme Judicial Court, (A. 21-22). Petitioners did not raise the Fifth Amendment issue before the Maine Superior Court, (A.2-12) or the Maine Supreme Judicial Court (A. 13-22).

SUMMARY OF THE ARGUMENT

The United States Supreme Court has no jurisdiction over this matter. Petitioners cite the Fifth Amendment as the basis of jurisdiction. This issue was not presented to the state courts below. Furthermore, the Fifth Amendment has no application to this legal malpractice claim, since the Fifth Amendment is a limitation on the federal government and not on private parties.

Certiorari is not a matter of right, but of judicial discretion. Sup.Ct.R. 10.1. Petitioners Bruce W. Jackson and Jeannette L. Jackson petition the Court to review a decision of the Maine Supreme Judicial Court affirming summary judgment in favor of Jim Mitchell and Jed Davis, P.A. on the grounds that Petitioners failed to produce expert testimony in support of their claim against the attorneys for negligence. Petitioners state that this matter is within the jurisdiction of the United States Supreme Court because the Maine Supreme Judicial Court's requirement of expert testimony in their case has deprived them of life, liberty, or property without due process of law, and thus violates the Fifth Amendment of the United States Constitution.

Essentially, Petitioners' argument is that the attorneys' alleged negligence was obvious and within the ordinary knowledge and experience of laymen, and therefore expert testimony as to the standard of care and the attorneys' breach thereof was not necessary to oppose Respondent's motion for summary judgment. The Maine Superior Court,

Penobscot County and the Maine Supreme Judicial Court disagreed. Petitioners are now asking the United States Supreme Court to review the conclusion of law reached by the Maine Superior Court and Maine Supreme Judicial Court.

This matter is not within the jurisdiction of the United States Supreme Court. Any federal question presented in Petitioners' Petition for Writ of Certiorari was not raised in state court proceedings, and therefore the Supreme Court lacks jurisdiction under 28 U.S.C. Section 1257. Furthermore, Petitioners' Petition for Writ of Certiorari does not raise a federal question.

I. ANY FEDERAL QUESTION PRESENTED BY PETITIONERS WAS NOT RAISED IN THE SUMMARY JUDGMENT ACTION IN MAINE SUPERIOR COURT; NOR WAS IT RAISED IN THE APPEAL TO THE MAINE SUPREME JUDICIAL COURT.

Title 28 U.S.C. Section 1257 grants the Supreme Court authority to review, by Writ of

Certiorari, a final judgment of the highest court of the state "where any title, right, privilege or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States." 28 U.S.C. Section 1257(a). This statute requires the federal question raised in the Petition for Writ of Certiorari to have been presented to the state courts. See Webb v. Webb, 451 U.S. 493, 68 L.Ed.2d 392, 396 (1981). In this case, Bruce and Jeannette Jackson raise the constitutional issue for the first time in this Petition for Writ of Certiorari. Therefore, the petition must be denied for want of jurisdiction. Id. The policy reasons underlying the statute include federal-state comity, the need for parties to have an opportunity to develop the record necessary for adjudicating the issue, to permit state courts to exercise their authority to construe state law, to allow for identification of independent and adequate state grounds, and to allow state courts an opportunity to

decide dispositive issues which might obviate the need for Supreme Court review. Id. at 399. Respondent had no opportunity to develop evidence regarding the constitutional issue Petitioners now raise for the first time.

II. PETITIONERS HAVE FAILED TO RAISE A FEDERAL QUESTION.

Supreme Court Rule 10 sets forth the character of reasons which will be considered sufficient for the Supreme Court to grant a writ of certiorari. With regard to decisions of a state court of last resort, the Rule states that the Supreme Court will consider granting certiorari when the state court has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals. Sup.Ct.R. 10.1(b).

While Petitioners assert the Fifth Amendment as the basis of their Petition are challenging the Maine Supreme Judicial Court's conclusion that the negligence alleged by the Jacksons in their legal

malpractice counterclaim was not obvious or within the ordinary knowledge and experience of laymen: "These facts show an obvious neglect of duty to the Appellants (sic) by the Appellees (sic) and present questions which should be heard by the trier of fact." Petition for Writ of Certiorari, Bruce W. Jackson and Jeannette L. Jackson, Petitioners, p. 19. Petitioners never explain how the Fifth Amendment is implicated by the legal malpractice counterclaim.

The issue Petitioners raise is not a federal question. A federal question requires presentation of a claim under a federal statute or the Federal Constitution. Webb v. Webb, 69 L.Ed.2d at 400. Petitioners merely want review of a state court's application of state law.

Furthermore, the constitutional claim asserted by Petitioners is inappropriate. Petitioners' Fifth Amendment rights cannot have been violated by Jim Mitchell and Jed Davis, P.A., a private entity. The Fifth Amendment is a limitation on the federal

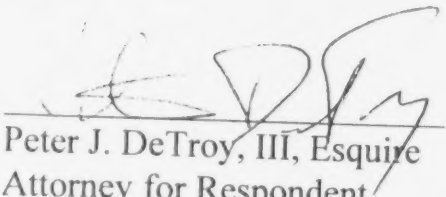
government, and has no reference to state actions. Ex parte Whistler, 65 F.Supp. 40 (D.C.Wisc. 1945), appeal dismissed 154 F.2d 500, cert. denied 327 U.S. 797, 90 L.Ed. 1023, rehearing denied 327 U.S. 819, 90 L.Ed 1041. It likewise has no applicability to a legal malpractice claim against a non-governmental party.

Nor have Petitioners demonstrated a conflict between the way in which the Maine Supreme Judicial Court applied the rule requiring expert testimony in legal malpractice matters, and the manner in which the rule is applied in other state courts of last resort. None of the cases cited by Petitioners suggest that Respondent's withdrawal from representing Petitioners in light of the absence of any credible expert banking testimony to support their claims in the underlying suit, while offering to protect their interests by advising them with regard to proceeding pro se, would have constituted "obvious" malpractice in any other jurisdiction.

CONCLUSION

Petitioners, by this Petition for Writ of Certiorari, are requesting the Supreme Court to reconsider whether the facts found by the Superior Court, and relied upon by the Maine Supreme Judicial Court, fit within one of the exceptions to the requirement of expert testimony in a legal malpractice suit, as set forth in the rule adopted by the Maine Supreme Judicial Court. This is a question of interest only to the individual parties to this matter, and not of importance to the public. See Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393, 67 L.Ed. 712, 714 (1923). The United States Supreme Court should decline to review the decision of the Maine Supreme Judicial Court in the matter of Bruce W. and Jeannette L. Jackson v. Jim Mitchell and Jed Davis, P.A.

Dated: 1-7-94



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Case No. 93-888

THE SUPREME COURT OF THE UNITED STATES

TERM COMMENCING OCTOBER 4, 1993

BRUCE W. JACKSON and
JEANNETTE L. JACKSON,

Petitioners,

v.

JIM MITCHELL and
JED DAVIS, P.A.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE

PETITIONERS' REPLY BRIEF

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REPLY TO ARGUMENTS OF RESPONDENTS

The Respondents in this case have set forth the argument that this case has no federal issue and therefore the Petitioners have failed to establish this Court's jurisdiction under Rule 10.1(b). The Petitioners must again state that the federal issue in this cause is the deprivation of their real property without due process of law. The lower courts have set forth summary judgment in these proceedings and state expert evidence is required in a legal malpractice case to establish the attorney's breach of duty "except in cases where the breach is so obvious that it may be determined by the Court as a matter of Law, or is within the ordinary knowledge and experience of laymen." Jim Mitchell and Jed Davis, P. A. v. Jackson, 627 A.2d 1014, 1017 (ME 1993)

The issue in the underlying cause is that the firm of Mitchell and Davis allowed the statute of limitations to run to near completion before dropping the case into the lap of the Petitioners who had no legal knowledge at that time concerning the legal issues of that case. This circumstance is parallel to one chosen by the Supreme Court of the State

of Hawaii to be an instance when expert testimony is not needed.

It is not an absolute rule that expert testimony be presented to establish the standard of care in all cases involving legal malpractice. Legal malpractice may be sufficiently clear without the advice of experts in which case it is for the trial court to determine the reasonable standard of care, skill and diligence which must be exercised by an attorney. Collins v. Greenstein, 595 P.2d 275 (HI 1979)

Rule 10.1(b) reads when a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeal. In concluding that no expert evidence was needed in the instant case, when clearly the statute of limitations was allowed to run, the Maine Supreme Judicial Court sitting as the law court (that state's highest court) is in direct conflict with the Hawaii Supreme Court (that state's highest court) therefore the issue becomes one of a factual basis rather than a summary judgment issue.

In granting a summary judgment in favor of Mitchell and Davis, P.A., when there is a factual issue to be resolved, the Court has deprived the Jacksons of their right to due process guaranteed under the Fifth Amendment of the United States Constitution. In order for the appellate courts to uphold the summary judgment they must "first view the evidence in the light most favorable to the party against whom judgment was granted." Town of Freeport v. Greenlaw, 602 A.2d (ME 1992) This has clearly not been the case here.

The Respondents also point out that Petitioners did not fulfill Rule 14(h) which requires us to supply specific citations and quotations of "the stage in the proceedings, both in the court of first instance and in the Appellate Courts, at which the Federal questions sought to be reviewed were raised." They also point out that Rule 14(k) requiring the Petitioners to file an appendix has not been met. Petitioners herein say that the reason for not addressing at what point in the proceeding the question was raised is as follows:

1. The issue did not exist in the lowest court until

that Court granted summary judgment in favor of Jim Mitchell and Jed Davis, P.A.

2. The Supreme Court of Maine based its decision on briefs alone. Petitioners here had wanted to give oral testimony at which time the point would have been noted and put on the record; however, the Court decided the action non-testimonial.

Therefore, the issue only exists in the opinions and judgments set down by the Courts. Those opinions and judgments are included in the Petition for Writ of Certiorari and comprise the entire appendix pages A1-A22. Copies were furnished to the Respondents.

Respondents also point to Rule 42.2 and refer to the Petition as frivolous and ask this Court to award damages and costs. Petitioners herein strongly believe that they have been wronged and deprived of their real property without due process of law. In order to regain the property in question, property of many times the value of any legal services, court costs or damages questionably owed the Respondents, they have no other recourse under the Law or Constitution but to ask this Honorable Court to review this

cause of action and uphold their guaranteed right under the Fifth Amendment of our Constitution.

CONCLUSION

Petitioners point out that the Respondents have failed to comply with Rule 29.5, which requires the certificate of service to be separate from the brief in opposition. Petitioners feel that this rule violation should be reason for denial of said brief.

Petitioners also must adamantly state that the attorney for the Respondents is still Petitioners' attorney. The law firm of Mitchell and Davis never petitioned the Court to withdraw as Petitioners' attorney. Therefore, a direct conflict of interest is at hand.

Petitioners also note that the requirement of Rule 33.1(c) has not been met by the Respondents, in that pages in their brief are not doublespaced.

Petitioners thus ask that the brief in opposition be rejected for failure to comply with the rules of this Court.

In conclusion, the Petitioners ask that this Honor-

able Court approve the Petition for Writ of Certiorari and give them the opportunity to present evidence in a court of law. This will allow them to regain possession of their property, or at least afford them their guaranteed right to due process under Amendment V of the Constitution of the United States of America.

Bruce W. Jackson,
Petitioner

Jeannette L. Jackson,
Petitioner